No. 21784

In the United States Court of Appeals for the Ninth Circuit

CHARLES JOSEPH BATTAGLIA, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District Court for the District of Arizona

BRIEF FOR APPELLEE

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STATUTES

UNITED STATES CONSTITUTION

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BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

On March 5, 1965, an Indictment was returned by the Federal Grand Jury sitting at Tucson, Arizona. (Clerk's Certificate to Record on Appeal, Item 1. Hereinafter, we will refer to the Clerk's Certificate as "C.C."; "R.T." refers to the reporter's stenographic transcript of the trial in two volumes, covering the proceedings of January 11, 19, and 20, 1967; "R.H." refers to the reporter's transcript of the hearing on

defendant's motion to suppress, covering the proceedings of January 16, 17, and 18, 1967. Other transcripts will be referred to by dates).

Appellant Battaglia, and Spinelli and Estes were charged with a violation of 18 U.S.C. 1951 in that they, while operating the Tucson Vending & Amusement Company, interferred with interstate commerce. It was alleged that on or about December 30, 1963, the defendants obtained space for a coin-operated pool table device and a share of the profits from the operation of said device by use of threats against Jerome C. Greenwell, the operator of the Diamond Pin Lanes Bowling Alley in Tucson. In a severed trial, Spinelli and Estes received a judgment of acquittal on December 9, 1965.

To aid the defendants as to the time periods involved, the Government tendered a Bill of Particulars on April 14, 1965 (C.C. Item 7) covering dates from December, 1963 to April, 1964.

On March 24, 1965 defendants moved for a change of venue and/or in the alternative, for a Continuance (C.C. Item 3). The trial date, originally scheduled for May 4, 1965, was set over to June 30, 1965.

On June 28, 1965 (C.C. Item 9) Defendant Battaglia moved for a Continuance on the grounds of ill health. Trial date was rescheduled for September 7, 1965. By reason of the claim of continued illness by the defendant, and by reason of the desire of the defendant to change counsel, the trial date of September 7, 1965 was vacated and the new date set was December 7, 1965.

On December 2, 1965 (C.C. Item 12), Battaglia moved for a Continuance citing his ill health as grounds. The trial date was rescheduled for March 15, 1966.

On March 9, 1966 (C.C. Item 18) Battaglia claimed illness and moved for a Continuance. Trial date was re-set for May 24, 1966.

On May 19, 1966 (C.C. Item 19) Battaglia, claiming ill health, moved for a Continuance. Trial was re-set for September 22, 1966. On September 20, 1966 (C.C. Item 17) Battaglia moved for a Continuance on the ground of ill health. The trial was scheduled for January 10, 1967.

On January 10, 1967 (C.C. Item 21) Battaglia moved for a Continuance claiming ill health. This motion was denied and trial was scheduled for January 11, 1967 (see R.T. Jan. 10, 1967, p. 3, line 22-24; p. 18, line 8-10).

On January 11, 1967, Battaglia waived trial by jury (C.C. Item 22). After the jury was dismissed, the Court noted for the record (R.T. p. 6) that the Government had disclosed the use of electronic surveillance concerning the defendant. The Court allowed defense counsel time in which to file a motion to suppress evidence. Said motion was filed on January 16, 1967. On January 16, 1967, the defendant appeared in a wheel chair, in hospital garb and attended by ambulance attendants, and with a supply of oxygen. The hearing commenced at 11:00 A.M. (R.H. Jan. 16, 1967). At 5:00 P.M. the hearing was recessed.

On January 17, 1967, the hearing was resumed. During a colloquy between court and counsel, the Court noted that the defendant appeared to be in physical difficulty. The court called for an immediate recess (R.H. p. 114) desiring to obtain a medical evaluation report before proceeding with the hearing. The defendant returned to the hospital and Dr. Richard L. Dexter, appointed by the Court, examined the defendant and made his report to the Court (R.H. p. 118-121; C.C. Supplemental Record —Report of Dr. Dexter filed January 18, 1967). On January 18, 1967, the Court concluded that the defendant was capable of appearing and assisting in his defense and the hearing was resumed. The defense motion was denied and the Court set trial to commence on January 19, 1967.

Trial to the Court was concluded on January 20, 1967, at which time Battaglia was found guilty of the charge.

On February 17, 1967, the Court sentenced the defendant to the custody of the Attorney General for a period of ten years and ordered a fine of ten thousand dollars.

This appeal is pursuant to 28 U.S.C.A. Sec. 1291.

II.

STATEMENT OF FACTS

Jerome C. Greenwell purchased the Diamond Pin Lanes, a bowling alley complex in Tucson on June 1, 1963 (R.T. p. 83) and operated the alley with his manager, Ida Chapman. He had met Charles J. Bat-

taglia in 1958 when they were introduced by a Mr. Louis Serota (R.T. p. 84). Early in June, 1963, Greenwell met with Battaglia and a discussion ensued regarding the placement of vending machines on the bowling alley premises (R.T. p. 86). Some machines were installed and did well. Greenwell and Battaglia met at the bowling alley in July, 1963 and talked about putting in additional vending and pin game machines (R.T. p. 87). Greenwell pointed out that he had a contract with the Canteen Company regarding a cigarette machine, but Battaglia told him that he would pay off the Canteen contract (R.T. p. 89). Greenwell agreed that if Battaglia (Tucson Vending Co.) would guarantee to pay any losses sustained by the Canteen Company, then Greenwell would permit him to put in the Tucson Vending machine (R.T. p. 90). A letter was sent to Greenwell (Exhibit 20) promising to indemnify losses (R.T. p. 91) and the additional Tucson Vending machines were installed on the bowling alley premises (R.T. p. 92). Battaglia wanted Greenwell to sign an exclusive contract with Tucson Vending Co. (Exhibit 21) (R.T. p. 92) but Greenwell refused until the Canteen Company contract was completed. This exclusive contract, Exhibit 21, had been offered to Greenwell as early as August, 1963 (R.T. p. 93).

Greenwell and Jack Gumbin, the lessee of the cocktail lounge at the Diamond Pin Lanes, agreed in December of 1963 to place a coin-operated pool table in the bowling alley (R.T. p. 95) after Gumbin had reported to Greenwell that Gumbin's pool table at the

cocktail lounge was doing well. In January, 1964, the pool table was delivered to be placed in the bowling alley (R.T. p. 95). A few days after this installation Battaglia came in to see Greenwell at the bowling alley (R.T. p. 96), angry that the pool table was not placed at the alley by Tucson Vending Company. Battaglia claimed that they had an agreement, and Greenwell told Battaglia that there was no exclusive agreement, verbal or otherwise. A heated argument ensued. Battaglia reminded Greenwell what happened to Serota. (R.T. p. 97). Greenwell explained that Serota had been found murdered in the trunk of his car.

Battaglia also said "You have a very attractive wife" (R.T. p. 98). "I know which way she goes home, and I'm sure you don't want anything to happen to her, and you don't want anything to happen to your factory" (R.T. p. 99).

When Greenwell and Battaglia both simmered down, Battaglia offered to purchase the pool table from Jack Gumbin (R.T. p. 99). Gumbin didn't agree and the pool table remained at the alley.

One morning after this exchange, Greenwell was informed that the pool table was damaged. The table had been slashed (R.T. p. 100).

Greenwell phoned Battaglia at the Tucson Vending office and accused Spinelli and Estes, both of Tucson Vending, of having slashed the table. Battaglia said "If you think the slashing of the cover is so bad, how would you like to have a bowling ball through the slate?" (R.T. p. 101). Greenwell stated that he was

in fear and told Gumbin to remove the pool table. (R.T. p. 102). It was replaced by a pool table from Tucson Vending.

Previous to the pool table incident, Greenwell had permitted Tucson Vending to replace the Canteen cigarette machine on the strength of the promise in the letter. (Exhibit 20) In the fall of 1963, Diamond Pin Lanes, Inc. was being sued by Canteen Company. (R.T. p. 104) Greenwell turned over the notice of suit to Tucson Vending and "forgot about the matter" because of the promise in the letter. (Exhibit 20) Early in 1964, the sheriff posted notices at the bowling alley concerning the sale of Diamond Pin Lanes properties to satisfy the Canteen judgment. (R.T. p. 104-5) Greenwell contacted the sheriff's office and was referred to the attorney representing Canteen, who told him he had to pay something on the judgment. Greenwell received a check for four hundred dollars (R.T. p. 105) from Tucson Vending marked "Advancement against commissions." Greenwell wouldn't use the check for a while, because the letter (Exhibit 20) meant to him that Tucson Vending, not Diamond Pin Lanes, Inc., was to indemnify any losses on the Canteen contract. When the sheriff's office was going to go ahead with the liquidation, Greenwell took the check to the Canteen attorney, who accepted the money as a part payment on the judgment, released the attachment, and gave Greenwell time to pay the balance. (R.T. p. 106) Greenwell signed the exclusive contract desired by Battaglia in April, 1964. (R.T. 107, Exhibit 21)

When Greenwell and Battaglia had their heated discussion prior to the pool table slashing, Greenwell did not immediately tell his wife of Battaglia's threat about her. Instead, he told her to take a different route home. After several weeks of telling Mrs. Greenwell which roads to take home, to avoid the darkened route she usually used, a domestic quarrel ensued. Greenwell then told his wife of the incident of the slashed pool table and the argument with Battaglia.

Mrs. Greenwell talked to a city detective of the Tucson Police Force and Mr. Greenwell reviewed the situation with the detective in March, 1964. (R.T. p. 108; Exhibit 19, Defendant's A)

On January 19, 1967, the Court admitted into evidence Government Exhibits 1 through 17, which were covered by a Stipulation and Agreement signed by defendant and his counsel and government counsel. (R.T. p. 32, line 6-9; p. 33, line 4) Exhibit 1 is a Business License issued to Tucson Vending showing Sal Spinelli as owner.

James Reeves and Larry Edmiston, formerly employed at Precision Motors, a gas station and car agency, were called as witnesses. Reeves stated he had received instructions from Battaglia as to the charge sheets on car servicing for the Tucson Vending Co. (R.T. p. 42, line 10-17) Edmiston testified he had seen Battaglia, Estes and Spinelli together around February, 1964 at which time Battaglia instructed him as to a date for servicing one of the vending company vehicles. (R.T. p. 47, lines 2-13)

Hugh Downs a bowling alley and theatre manager, recalled that Battaglia had a vending company (R.T. p. 51, line 3-11), and Don Thompson, a cocktail lounge operator, had been approached by Battaglia to put vending machines in at the cocktail lounge. (R.T. p. 58, line 7 to p. 59, line 11)

Ida Chapman was manager of the Diamond Pin Lanes from June, 1963 to Februray, 1964. She traced the business relationship between Battaglia and Diamond Pin, including Battaglia's desire for Greenwell to sign a contract with Tucson Vending (R.T. p. 72, line 13 to p. 74, line 20) in 1963.

Mrs. Greenwell testified as to the route she usually drove to get home at night, and to the insistence by Mr. Greenwell to change the route. She described the discord between them and how Mr. Greenwell came to tell her of the threats. (R.T. p. 217, line 13 to p. 219, line 1)

Don Bierschbach testified that he took over as manager of Diamond Pin, after Ida Chapman left in February, 1964. He described his relationship with Tucson Vending and with Battaglia. About late March, 1964, Bierschbach met Battaglia at another bowling alley, at which time Battaglia told Bierschbach that the disptue was none of Bierschbach's business,—to keep out of it or he would get his head bashed in. (R.T. p. 232, lines 14-22)

Thomas McCormick and Nathan Railey testified that they were working at Diamond Pin on the night of the pool table slashing, that they were alone and played on the pool table after 1 AM (R.T. p. 242, line

24 to p. 243, line 12). Later, Spinelli and Estes were admitted into the bowling alley to service the vending machines, and that after Spinelli and Estes were let out of the alley (R.T. p. 250, line 20-22), McCormick and Railey returned to the pool table for another game and found the table slashed.

Hoyt Wells saw the table in good condition earlier that night and observed the table slashed later that morning (R.T. 260-267).

Jack Gumbin corroborated Greenwell's joint purchase with him of the pool table. Greenwell was visibly upset when, after the slashing of the pool table, he wanted the table removed. It was subsequently replaced by a Tucson Vending table (R.T. p. 271, line 1-21). Agent Earl Fauver was the only witness called by defense and testified as to some of the interviews he had with various witnesses.

III.

OPPOSITION TO SPECIFICATIONS OF ERROR AND SUMMARY OF ARGUMENT

1. Sufficient evidence to convict was presented to the Court to support its finding of an extortion and an effect upon interstate commerce.
2. The District Court did not restrict cross-examination of Mrs. Greenwell.
3. The defendant failed to show that the Government obtained any evidence or leads to evidence from electronic surveillance and that the Government violated his right to counsel. The Court did not improperly restrict the scope of the Motion to Suppress hearing.

IV.

ARGUMENT

1. Sufficient Evidence to Convict Was Presented to the Court to Support Its Finding of an Extortion and an Effect Upon Interstate Commerce.

The trial court found from stipulated evidence (C.C. Item 29) and from uncontroverted direct and circumstantial testimony that there was an extortion and an effect upon interstate commerce.

The indictment charges the defendant with affecting commerce "and the movement of machines, materials, and supplies for . . . Diamond Pin Lanes . . . , in such commerce, by extortion . . . ."

To invoke federal jurisdiction, it is necessary to show movement in interstate commerce. To invoke the sanctions of the Hobbs Act (18 U.S.C. 1951) there must be an effect upon interstate commerce by extortion.

Generally, supplies for the bowling alley came from the Brunswick Company in California (R.T. p. 61, line 22-25, p. 62, line 1). Six of the coin-operated devices that came to the bowling alley were shipped from California. (See Stipulation, C.C. Item 29, and Exhibits 13, 14, 15, 16 and 17). These are machines that are enumerated on the contract, Exhibit 21.

Specifically, the pool tables destined for Diamond Pin Lanes were moved in interstate commerce and traced by the Stipulation (C.C. Item 29) and Exhibits 2 through 12.

> ". . . It is not for the jury to determine what is or what is not interstate commerce—that is a

question of law . . . ." *Nick* v. *United States*, 122 F. 2d 660, 673.

The sale of goods which originated from out-of-state has been held to constitute interstate commerce. *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) (Reliance bought and distributed fuel oil entirely in New York, however, Reliance's supplier was an interstate business). In *De Gorter* v. *Federal Trade Commission*, 244 F. 2d 270, 280 (9th Cir. 1957) occasional out-of-state sales, advertisements in interstate publications and out-of-state origin of 25% of the products was held to be interstate.

The Hobbs Act language has been interpreted to apply to a business not itself in interstate commerce, *United States* v. *Malinsky*, 19 F.R.D. 426 (2 Cir. 1956), and to one which depended upon interstate commerce for its materials, equipment and supplies. *Hulahan* v. *United States*, 214 F. 2d 441, 445 (8th Cir. 1954).

There is basis in law, therefore, for the trial court to find that the movement of the pool tables was in interstate commerce. This was sufficient for the trial court to invoked federal jurisdiction.

We think appellant has misconstrued the import of *United States* v. *Stirone*, 361 U.S. 212 (1959), which is distinguishable from the instant matter. In *Stirone*, the Supreme Court reversed because the indictment, which charged interstate importation of materials, was broadened by the trial court in allowing the jury to hear evidence of the interstate *exportation*

of the finished product. The defendant, was thus tried on charges not in the indictment.

The Court agreed that the *Stirone* jury was entitled to convict on the evidence regarding the interference with the importation of materials. However, the "difficult question" as to the effect on shipments to be exported was not reached, because the Court agreed with the dissenting judges in the Court of Appeals that it was error to submit that question to the jury.

We do not read into this decision any approval of Judge Hastie's dissenting view as to the invoking of federal or state jurisdiction. On the other hand, the Supreme Court notes that the Hobbs Act speaks in "broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.' " (p. 215)

Having found that the devices moved in interstate commerce, we now reach the question of the effect on interstate commerce.

Commerce may be affected even though the actual movement of goods has ceased and the character of the goods altered in the hands of the consumer. *United States* v. *Stirone*, 168 F. Supp. 400, 496. In discussing the effect on interstate commerce the Court made this observation:

> ". . . the only criteria which this court may properly employ to determine whether this act is applicable are whether the channels of interstate commerce have been used and whether the free

> passage of articles therein has been threatened. The court correctly told the jury that *if the government's facts were believed*, interstate commerce had been affected by the conduct of the defendant. (Cit. therein). That statement was based upon a premise that a deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs, and affects interstate commerce as surely as though the same act had cut off the supply at its source." (emphasis ours)

It was established that the pool table at the bowling alley was slashed. The trial court found that "the only people on the premises during the time that this could have occurred was Spinelli and some other person, (Estes) and of course Spinelli is connected with Tucson Vending." (R.T. p. 311, line 21-23) Spinelli was the nominal owner of Tucson Vending Co. (Exhibit 1) The reasonable inference is that the slashing was done by Spinelli and Estes. (R.T. *2/17/67* p. 7, line 21) Here, then, is a deliberate act "which tends to prevent" the article from being used. This is evidence of an effect upon commerce.

There is no judicial standard set for measuring the effect on interstate commerce.

> "The statute provides that effect 'in any way or degree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial.

> The substantiality of the effect is not left open to judicial interpretation." *Malinsky, supra*, p. 428

Accordingly, the trial court properly invoked federal jurisdiction under the Hobbs Act.

It is well established that on appeal in resolving the issue of sufficiency of the evidence to sustain a conviction the reviewing court must view the evidence and all reasonable inferences which may be drawn therefrom in a light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80. And, as this Court has stated in the past, it will not second-guess a trier of the fact who has heard the testimony, scrutinized the witnesses and noted their demeanor on the witness stand and had the opportunity to place his reliance upon those whom *he* believes to have been telling the truth. *Perez* v. *United States*, 297 F. 2d 648-649 (9 Cir. 1961); *Maldonado* v. *United States*, 325 F. 2d 295 (9 Cir. 1963); *Davis* v. *United States*, 327 F. 2d 301 (9 Cir. 1964).

In *United States* v. *Crumble*, 331 F. 2d 228, 230 (7 Cir. 1964), Crumble was convicted of inducing one, Gloria Dixon, to travel in interstate commerce for the purpose of prostitution. Trial was to the court. In reviewing the case, the Court observed:

> "The fact that Gloria Dixon, the chief witness for the prosecution, gave testimony before a Federal Grand Jury inconsistent with her trial testimony implicating the defendant and also, admitted she testified differently at a State investigatory proceeding goes only to the credibility of her trial testimony—a matter of resolution by

> the trier of the facts. Her trial testimony was not without corroboration in the form of reasonable inferences which arise from the testimony of others and by what the record reveals with respect to the admissions and conduct of the defendant."

The testimony here shows that as a result of threats made by Battaglia, Greenwell was in a state of fear. (R.T. p. 102 line 20-22; p. 118, line 18-21; p. 123, line 10-12; p. 152, line 12-13; p. 189, line 20; p. 190, line 4-17; p. 218, line 26 to 219, line 1; p. 271, line 1-11) The trial court found sufficient evidence to hold that there was a generation of fear, an act of violence, and the replacement of the slashed pool table by one from Tucson Vending. This, we submit, supplies the element of extortion.

2. The Trial Court Did Not Restrict Cross-Examination of Mrs. Greenwell.

Without detailing all of Mrs. Greenwell's testimony, it is clear that she corroborates her husband's statements as to the circumstances under which Mr. Greenwell told her of the threats. (R.T. p. 217, line 10 to p. 218 line 6)

Although not material, the trial court permitted defense counsel to pursue a line of questions concerning Mrs. Greenwell's attendance at a dog track and her attendance at dances. (R.T. p. 223) When the court questioned the materiality, defense counsel offered that such testimony would show that Mr. Greenwell should be worried about her attendance at a particular night club. Counsel argued that "proof

that the witness was accustomed to go out at night is a situation which *might* create suspicion and jealousy" (R.T. p. 224, line 21-23) and would bear on the victim's state of mind. (emphasis ours)

The Court suggested that this line of questioning had no probative value, and quite reasonably stated (R.T. p. 225, line 22) "If you want to go into it, I will withdraw my ruling and permit you to go ahead and go into this aspect of it; and rather than sustain the objection on my own motion, you go right ahead." Defense counsel indicated that to move forward was useless, but the Court reiterated (R.T. p. 226, line 4) "You make a record; you can put it in the record if you wish."

This colloquy took place after several minutes of exploratory cross-examination. Defense counsel moved on to other matters, then returned to his original premise regarding Mrs. Greenwell's visits to the dog track and her dancing. This time, however, counsel was more specific in his questions. (R.T. p. 229)

Q. During this period of time, January '64, February '64, March '64, April '64, did you go to the dog track?
A. I am sorry, I really don't know whether I did at that time or not.
Q. During that period of time, did you go dancing?
A. I really couldn't say. I don't remember if I did during those particular months or not.

If in fact, Mrs. Greenwell did visit night clubs or the dog track during that period of time, this would have no bearing on Greenwell's concern for her safe-

ty. As the trial court suggested, if defense counsel could show that Greenwell advised her to change her route because he didn't want her to stop by some tavern or some drinking establishment, this could affect Greenwell's credibility. (R.T. p. 225) But, counsel was unable to do so—not because of any claimed restriction on his cross-examination,—but simply because that was not the fact.

> "The extent of cross-examination with respect to an *appropriate* subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted." *Alford* v. *United States*, 283 U.S. 687, 694. (emphasis ours)

The trial court did not abuse its discretion nor limit the defense from pursuing a full cross-examination of Mrs. Greenwell. The record shows clearly that defense retreated from its offer to show that Mr. Greenwell *might* be affected by jealousy and suspicion rather than Battaglia's threats. The right of cross-examination was not denied to the defendant.

3. The Defendant Failed to Show That the Government Obtained Any Evidence or Leads to Evidence From Electronic Surveillance and That the Government Violated His Right to Counsel. The Court Did Not Improperly Restrict the Scope of the Motion to Suppress Hearing.

On January 11, 1967, before the trial opened, Mr. J. F. Cunningham, a Department of Justice attorney, disclosed to the Court and defense counsel that electronic surveillance had taken place in connection with

the defendant. A verbal motion to suppress was made by defense counsel and a hearing was set for January 16, 1967.

At the hearing, Mr. Cunningham made a statement outlining the government's policy as reflected in the Solicitor General's statement, the fact that the surveillance was promptly disclosed to the Court and counsel, and conceded that the surveillance took place at the following locations at the stated time periods:

Residence of Joseph Hootner	1/23/61 to 3/13/61
Travelodge Motel, Los Angeles	1/12/62 to 1/13/62
Residence of Battaglia	5/25/62 to 10/ 1/62
and	5/ 9/63 to 8/12/63
Tucson Vending Co., Tanque Verde Road	6/18/64 to 8/ 7/64
Tucson Vending, E. Grant Rd.	9/23/64 to 11/20/64

It was also conceded that these electronic surveillances were maintained by microphones installed by trespass. (R.H. p. 19-23) All of the logs of the conversations in which Battaglia was a participant, or in which participants mentioned him, were turned over to the Court and defense counsel.

When the disclosure had earlier taken place, a colloquy ensued between the trial court and defense counsel as to the scope and import of the hearing, and the procedure to be followed.

Defense counsel made the following statements:

> ". . . . at the very least, the Government should proceed to show that its lawlessness has not infected this indictment." (R.H. p. 5, line 10-12)

prosecution. In *Silverman* v. *United States*, 365 U.S. 505 (1961) the Court held that conversations overheard by microphone surveillance installed by trespass were obtained in violation of the Fourth Amendment and could not be used in a prosecution of the parties to the conversation. It follows that evidence obtained by leads from such conversations also may not be used. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392.

The Government conceded that it trespassed in microphone surveillance and all logs reflecting the conversations thus illegally overheard were turned over to the Court and defense counsel. This takes care of the first issue completely.

The issue remaining at the hearing was whether or not the information in the logs was used directly or indirectly as evidence, or leads to evidence, in this prosecution, and if so, whether or not a substantial portion of the case was derived from the tainted source.

The Court properly limited the hearing to the remaining issue, waiting for defense counsel to show specifically from the logs what was contained therein that would taint any of the evidence.

It was the appellant's contention then, as here, that he was not bound by the extent of the Government's disclosure. We agree—but this takes us back to the first issue on a Motion to Suppress.

At this point we are back to a *defense burden* to show that other illegal devices were used. Since this occurred at the hearing, the Court could, but did not,

require affidavits setting forth allegations of *evidentiary* facts upon personal knowledge, or setting forth the source of the knowledge and grounds for this belief. (If a new hearing were to be requested at this point, pending appeal, this Court would require a solid showing by way of affidavits in order to decide if the petitioner should be granted a hearing.)

The trial court realized that this was to be a discovery expedition and permitted the defense counsel the opportunity to "fish." (R.H. 95) The voyage produced no fish.

When the appellant was unable to show any other illegal eavesdropping, the contention was made by an offer through defense witness Adcock. (R.H. 224-227) This was properly refused as hearsay.

Appellant now contends that Battaglia should be clothed with immunity from prosecution because he was the subject of illegal electronic eavesdropping, overlooking that Battaglia gave no testimony, did not claim or admit as his any of the overheard conversations in which he was a participant, and that nothing contained in the logs was used as evidence against him at the trial.

The short answer is that his conversations are not the product of any official compulsion, *Olmstead* v. *United States*, 277 U.S. 438; *Hoffa* v. *United States*, 385 U.S. 293; *Osborn* v. *United States*, 385 U.S. 323, therefore *Counselman* v. *Hitchcock*, 142 U.S. 547 is not applicable in the instant matter.

Appellant strenuously urges that the Government violated Battaglia's right to counsel. Let us examine this claim.

The logs of the electronic surveillance reveal two innocuous conversations between Battaglia and attorney Soble. One took place on June 21, 1963, at Battaglia's home and the other took place at the Tucson Vending Company office on Tanque Verde Road on July 17, 1964.

The June 21, 1963 monitoring took place approximately nine months before Greenwell reported to the Tucson police. (Exh. 19-Def.Exh.A.) It took place about *seven months prior to the alleged violation* described in the indictment and trial.

The July 17, 1964 monitoring took place after the alleged violation but before the indictment was returned on March 5, 1965. This monitoring occurred after there ceased to be a business relationship between Greenwell and Tucson Vending.

Soble testified in vague terms as to his representation of Tucson Vending Co. (R.H. 228) "Tucson Vending started sometime in 1963 . . . . Mr. Alch handled most of it; I was in on some of the discussions . . . . Mr. Alch did the majority of the legal work," finally placing his personal representation as beginning in March, 1964. Soble also related a conversation (R.H. 233) he had with Battaglia around March or April, 1964 regarding an argument Battaglia had with Greenwell. Soble did not state specifically where this particular conversation took place, but later stated generally that he had discussed matters with Battaglia at his home, at the Speedway office, and at the other offices of Tucson Vending on Tanque Verde Road.

It is interesting to note that the one conversation alluded to by Soble (obviously with consent from Battaglia as to the attorney-client privilege) took place at a time when there was no electronic surveillance.

Appellant weaves a web of sophistry with strands of speculation. The contention is that there *may* have been other electronic surveillance, particularly at the Speedway office location, and if so, this conversation *might* have been monitored. This is the "sheer guesswork" and the "mere conjecture" held insufficient in the past. *United States* v. *Flynn*, 103 F. Supp. 925, 930 (SDNY), *affirmed* 216 F. 2d 354 (2 Cir.), *cert. denied* 348 U.S. 909; *United States* v. *Weinberg*, 108 F. Supp. 567, 569 (D. D.C.). This is hardly the solidity of a claim that the government's case is tainted. *Nardone* v. *United States*, 308 U.S. 338, 341.

There are two important colloquies in the record of the hearing. In one (R.H. p. 144-154) the Court requested defense counsel to point out with particularity what evidence it could show as tainted. Counsel, unable to show any particular suppressible evidence, claimed that Greenwell's complaint was predicated on eavesdropping and therefore the *whole* investigation was tainted.

In the other (R.H. p. 175-188) defense counsel attempted to broaden the scope of the hearing as to the possibility of other surveillance and the speculative aspect was readily apparent when defense counsel made an offer of proof.

Defense counsel wanted testimony from former Agent Snell, who had made the physical installations of the microphones. Through Snell, counsel hoped to show that there were installations not disclosed by the Government and that such alleged surveillances were the basis for the original contact with Greenwell. (R.H. p. 176, line 8-12) It was obvious to the Court that testimony from Snell, even if it were to show that the Government had placed microphones not disclosed and that conversations between Battaglia and Greenwell were overheard, would not overcome the fact that the first FBI contact with Greenwell was in April, 1964 and that Greenwell reported the matter to the Tucson Police *independently* in March, 1964. In view of the defense's failure to make any showing as to Snell's possible testimony, we believe the Court ruled properly.

At the end of the hearing, Mr. Krieger stated that he was ready to subpoena Snell to avoid any procedural lapse. The Court stated (R.H. p. 252):

> "You are not faced with that problem. In other words, the technical objection that you failed to request the Court to order subpoena be issued for him is of no consequence and *would not bar you presenting that situation at some later time.*" (Emphasis ours)

The defense did not later raise this issue at the trial, nor, more importantly, is there an affidavit now from Mr. Snell presented with appellant's brief, so that this Court could be fully apprised of the truth of the defense contention as to Snell.

Finally, we make reference to the recent case of *United States* v. *Carabbia* (6th Cir. decided July 31, 1967.) —— F. 2d ——.

After Carabbia had been convicted and pending appeal, defendant filed a motion for an order requiring the Department of Justice to examine its files to determine whether Carabbia had been subject to electronic surveillance. Government counsel admitted that a microphone had been placed in business premises under control of the defendant.

The case was remanded to the District Court with instructions to conduct a prompt and full hearing upon all aspects of the Government's use of electronic equipment and to make findings of fact and report to the Court.

The only difference from this case is that the hearing in *Carabbia* was held after the trial.

In the District Court's findings (Appendix B of the decision) there is a statement (note 3) of interest in our matter.

> "Counsel for Mr. Carabbia attempted during the course of the hearing to undertake a wide-scale, independent investigation of varied governmental agencies in an effort to uncover further electronic surveillance. Taking into consideration the language of the Sixth Circuit Court of Appeals' order and the circumstances set out in this finding of fact, the Court deemed that such efforts on the part of defense counsel constituted nothing more than an *unwarranted stab in the dark and, therefore, did not allow counsel to pursue the same.*" (Emphasis ours)

The Court, at the close of our trial, made a specific finding that there were no instances where it appeared that the testimony was obtained or in any way was associated with the electronic surveillance or any other activities of the Government wherein a trespass was committed against the defendant. (R.T. p. 297, line 1-6)

We respectfully submit that the logs show no relationship to the instant matter, that the evidence used was free from taint and that the case arose out of independent origin.

V.

CONCLUSION

It is respectfully submitted that there is sufficient evidence to support the charge, that there was no restriction on cross-examination of any witnesses, and that the case submitted was entirely free of any taint. The conviction should be affirmed.

Respectfully submitted

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Three copies of the within Brief of Appellee mailed this 31st day of August, 1967, to:

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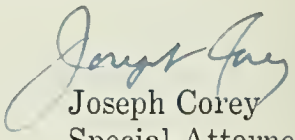
APPENDIX A

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Joseph Corey
Special Attorney
Department of Justice

APPENDIX B

Supplement to Appellant's Index to Exhibits

	Identified	Admitted
Government Exhibit 19, also marked	123	
as Defense A	47	124*

* It is our recollection that this item was admitted for a limited purpose, as evidenced by the colloquy on pages 123 and 124 of the reporter's transcript of the hearing.

Defendants B, C, D, and E, are all single log sheets admitted as part of all of the logs offered by the Government under # 18.

APPENDIX C

Section 1951, Title 18, United States Code, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all

commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

United States Constitution, Amendment IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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